IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. ~~903~~ 42

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF, and Others,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, AND THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827.

JOHN M. DOWNES,
Attorney for Louis H. Pink, Superintendent of Insurance of the State of New York as Liquidator of the Domesticated United States Branch of First Russian Insurance Company, Established in 1827, Respondent,

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Opinions Below

The memorandum decision of the New York County Supreme Court (R. 52) is not reported. The decision resulting in the order and judgment of affirmance by the Appellate Division, First Department of the New York Supreme Court (R. 57, 61) was rendered without opinion

and is reported in 259 App. Div. 871. The *per curiam* opinion of the Court of Appeals of the State of New York is reported in 284 N. Y. 555, advance sheets of March 22nd, 1941. No application was made for rehearing or certification of questions in the highest State Court.

Jurisdiction

The same questions now raised in the case at bar were raised by the same petitioner and decided adversely to it in the case of *Moscow Fire Ins. Co.* v. *Bank of New York and Trust Co.*, 280 N. Y. 286, affirmed 309 U. S. 624, rehearing unanimously denied by the full Court 309 U. S. 624. (See Journal of March 25th, 1940, No. 355—October, 1939 Term.)

The only question raised by the record in the case at bar was whether the Special Term should decide the motion for summary judgment or await a decision by this Court in the *Moscow* case (R. 50-51). No other question in the instant case was involved or raised in the Court below which had not been finally settled and decided in the *Moscow* case where the State Courts found as a matter of fact that the same Soviet decrees (R. 13-14, 15-16) under which the same petitioner as assignee claims here did not apply to assets in New York of insurance companies nationalized in Russia. The decision in the *Moscow* case was not based on any federal ground, and the New York Court of Appeals, the highest State Court, has held there is no difference here (284 N. Y. 555). There is no reason shown why certiorari should be granted on the present application to again review the same questions recently decided adversely to the petitioner by this Court.

There is no basis for petitioner's assertion that the State Courts did not recognize the Litvinoff assignment of

November 16, 1933. Giving all due recognition and effect to the Litvinoff assignment (R. 36a-36b) the *Moscow* case conclusively settled that in so far as assets of the character involved here were concerned, nothing passed by virtue of that assignment, the assets in question having at all material times been in lawful custody and possession of a State officer in New York beyond the scope and effect of the Soviet decrees. Any question as to the effect or operation of the Soviet decrees within Russia is not involved here but that such decrees did not operate and by their own terms were not intended to operate to affect the assets involved in the case at bar was settled in the *Moscow* case.

There is no federal question involved in the case at bar. The claim asserted by the plaintiff herein is predicated solely upon confiscatory decrees and laws of the Soviet Russian Government (Complaint, Pars. 8, 9, 10; R. 23-24), and is not based on any treaty or federal law. There is no question here as to the validity of a treaty or statute of the United States or the validity of any State statute as being repugnant to the Constitution, treaties or laws of the United States. Nor is there involved here any right, title, privilege or immunity under the Constitution or any treaty or statute of the United States, or commission held or authority exercised under, the United States within the meaning of Section 237(b) of the Judicial Code. There is merely a question of title to assets always situate in New York belonging to the Domesticated United States Branch of the First Russian Insurance Company, a separate and distinct entity under the laws of the State of New York, claimed by petitioner as assignee under nationalization and confiscation decrees of the Soviet Russian Government.

The petition (p. 2) asserts that the decision of the Court below gives rise to the question whether State law

or Federal law determines title to the property involved in the instant case. The petition does not show, however, any specific federal law, constitutional provision or treaty upon which such contention is founded. The Litvinoff assignment and its acceptance (R. 36a-36c) only authorized prosecution by the United States Government of any claim the Soviet Russian Government might theretofore have prosecuted subject to the laws of the jurisdiction in which such claim might be advanced or made. The assignment and acceptance by the United States did not give any greater force or effect to such claims as might be made nor were they altered in any respect. Nothing new was created concerning such claims different from what may have existed prior to the assignment and the agreement did not purport to nor could it lawfully confer any greater rights than the Soviet Government itself could exercise after recognition. No local or State laws or rights vested pursuant thereto were purported to be overriden by virtue of the assignment and acceptance (*Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143). The United States in the case involved here has no greater rights before the Court as a claimant or litigant than a private party (*Guaranty Trust Co.* v. *United States, supra*).

POINT I

The complaint was dismissed and the motion for summary judgment was correctly decided because the action was prematurely brought.

Although the basic facts in the *Moscow* and *First Russian* cases concerning organization in the United States are identical, there are some important vital differences of

which this Court should be apprised, particularly with regard to the surplus fund which the Government claims.

The Moscow and First Russian were both taken over for liquidation in 1925. Both were Russian companies with domesticated United States Branches in New York, organized and doing business in accordance with New York requirements.

In February, 1931, the New York Court of Appeals (*Matter of People, First Russian Ins. Co.*, 255 N. Y. 415) directed the Superintendent of Insurance to pay all valid foreign claims filed in the liquidation proceedings of both the Moscow and First Russian companies and to pay the surplus then remaining, that is, the surplus remaining after payment by the Liquidator of all valid foreign claims filed with him, in the case of the Moscow to its Conservator, and in the First Russian to the company represented by its Board of Directors (R. 28-29, 40). The decision of 255 N. Y. 415 was a final non-appealable judgment, finally settling and fixing the rights of creditors, and its decision was approved by this Court in 296 U. S. 463, 476, where the Court said:

> "The state court still had control of the property and questions as to the rights of the parties who were before it, or of those who might come before it, were legal questions which the court had jurisdiction to decide."

The distribution of funds was fixed not only by the decision in 255 N. Y. 415, but by the decision of the New York Court of Appeals in the liquidation proceedings in *Matter of People, First Russian Insurance Company*, 274 N. Y. 545 (May, 1937), which allowed interest on certain claims.

In the *Moscow* proceeding relatively few claims were filed, there was a surplus after payment of all foreign claims filed with the Liquidator and the surplus was turned over to a depositary (the conservator having elected not to put up a bond). Thereafter, a proceeding was instituted by the conservator and stockholders to determine the method of distribution of that surplus fund. The Liquidator was not a party to that action since he had completed his duties when the Moscow surplus was turned over. The United States, however, intervened in said action, asserting paramount title, over and above the title of the stockholders or owners of the company, to the surplus which had been turned over by the Liquidator.

In the First Russian liquidation proceeding, however, the Liquidator is still functioning, the liquidation is still incompleted (R. 16, 34, 42, 48). In this proceeding no stockholders are involved, and there is as yet no surplus available to be turned over to the company. Unlike the *Moscow* case the Liquidator here has not paid all the valid and allowed claims filed with him pursuant to this Court's decision in 1931, and has not turned over any surplus to the company represented by its Board of Directors.

There is no surplus as defined by the Court of Appeals in 255 N. Y. 415 (R. 28-29) and there cannot be any until all claims have first been paid, some of them with interest which is accumulating every day. Only then can it be determined whether a surplus exists.

POINT II

On the record in the case at bar and under purely New York Law the complaint was properly dismissed and judgment rendered in favor of respondent, pursuant to Section 476 of the Civil Practice Act and Civil Practice Rule 113.

On the record now before this Court the New York County Supreme Court properly granted the present respondent's motion for summary judgment and dismissed the complaint (R. 52). That motion was made under and in conformity with *Civil Practice Rule 113* and *Section 476 of the Civil Practice Act*. (Appendices A and B, *post*.) It was not, as groundlessly asserted in the petition, a motion to dismiss the complaint for insufficiency as in the case of *United States* v. *Belmont*, 301 U. S. 324, relied upon by Petitioner (p. 2). The motion was duly made (R. 10) on the complaint (R. 19), answer (R. 37), and supporting affidavit (R. 12) showing the instant claim of petitioner to be identically the same as the claim of the United States denied and dismissed in the *Moscow* case, and that the facts and Soviet law with respect to both claims and the Soviet decrees relied upon by petitioner were the same as in the *Moscow* case (*supra*) then recently decided by the New York Court of Appeals (R. 14). The petitioner was required, under the fifth paragraph of Civil Practice Rule 113 providing for judgment in favor of a moving defendant showing facts establishing *prima facie* the sufficiency of its denial or defenses, to show facts "by affidavit or other proof" sufficient to raise issues requiring and entitling plaintiff to a trial. Prior to institution of the motion, the law of the State of New York with respect to the issues

involved here had been conclusively settled by the Court of Appeals in the *Moscow* case, the record and remittitur of which were contained in the files and records of the Supreme Court where the motion for dismissal and summary judgment in the instant case was decided, of which the Court had judicial notice. The petitioner's affidavit on the motion (R. 50) alleged or set forth no facts or other proof whatsoever which might entitle it to a trial of the issues, and merely requested a postponement until final determination of the *Moscow* case, and, in effect, constituted recognition and admission by petitioner that the *Moscow* decision was controlling in the case at bar. Indeed, upon argument of the instant case in the Court of Appeals the brief for the United States said (p. 8):

> "* * * Plaintiff-appellant believes that the trial court was correct in its interpretation of the *Moscow* case, and that adherence to the decision in that case would require dismissal of the present complaint. * * *"

The fifth paragraph of Rule 113 provides that:

> "Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit or other proof shall show such facts as may be deemed by the judge hearing the motion sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record."

Under the provision of the rule just quoted, the defendant (respondent in the present application) properly moved for summary judgment on the official record in the *Moscow* case irrespective of the question whether the instant case

is one of those enumerated in the eight preceding numbered sub-divisions of the first paragraph of Rule 113 (*Lederer* v. *Wise Shoe Co.*, 276 N. Y. 456; *White* v. *Merchants Dispatch Transporation Co.*, 256 App. Div. 1044; *Levine* v. *Behn*, 257 App. Div. 156; *Pross* v. *Foundation Properties, Inc.*, 158 Misc. 304).

Since no specific objection relating thereto was made, it was not indispensable that the official record in the *Moscow* case was not physically attached to the moving papers herein (*White* v. *Merchants Dispatch Transportation Co., supra*). In any event the record and remittitur of that case were officially filed in the New York Supreme Court, and the decision officially reported, of which the Court took notice. The opposing affidavit of the United States (R. 50) denied none of the facts alleged in the moving affidavit and showed no facts whatsoever other than that it was proposed to apply to the United States Supreme Court for a writ of certiorari in the *Moscow* case. It is well established law and practice in the State of New York that on motions of this character a plaintiff cannot rely on the allegations of the complaint as proof (Rule 113; *White* v. *Merchants Dispatch Transportation Co., supra; Gnozzo* v. *Marine Trust Co., Buffalo*, 258 App. Div. 298, aff'd. 284 N. Y. 49). Consequently, the reliance by the petitioner, United States, upon the *Belmont* case, where the allegations of the complaint had to be accepted as true, is not well founded.

POINT III

There is no federal question involved here and the decision of the New York Court of Appeals was based upon sufficient and independent non-federal grounds.

The *per curiam* opinion in the case at bar (284 N. Y. 555) incorporates by reference and is based upon the prior opinion in the *Moscow* case (280 N. Y. 286), in which latter decision the *Belmont* case was expressly distinguished. The basic decision clearly shows that it is based upon findings in accordance with State law that the Soviet decrees upon the facts proven did not apply to the tangible assets deposited pursuant to law in New York State of the domesticated branch of a nationalized Russian Insurer. That, alone, is an adequate non-federal ground for the decision of the Court below requiring dismissal of the present petition (*Tax Commission* v. *Wilbur*, 304 U. S. 544; *Lynch* v. *New York*, 293 U. S. 52, 54, 55; *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32, 33), or its denial, (*Public Service Comm'n* v. *Wisconsin Tel. Co.*, 309 U. S. 657; *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 2; *New York City* v. *Central Savings Bank*, 306 U. S. 661; *Honeyman* v. *Hanan*, 300 U. S. 14).

The corporation here involved was in effect a domiciliary New York corporation governed by New York law. So far as Soviet law and decrees are concerned, even if they were to be given effect, would not avail the petitioner, since the assets involved having always been located in New York and the corporation being a New York corporation, New York law governs. The Court of Appeals in the *Moscow* case has unequivocally stated that under New York law the Government, the petitioner here, is not entitled to the funds.

The further holding of the Court of Appeals in the *Moscow* case and in the instant case, following a long line of prior decisions, to the effect that the United States branch of a foreign insurance company established under the New York Insurance Law, constitutes an entity separate and distinct from the parent company and analogous to a domestic corporation, likewise raised no federal question since it depended entirely upon the construction of local state law (*Neblett* v. *Carpenter*, 305 U. S. 297, 302).

No new or novel federal question is presented by the record now before this Court nor was any such raised. Briefed or oral arguments in the State Courts as to federal questions cannot be availed of (*Lynch* v. *New York*, 293 U. S. 52, 54; *Zadig* v. *Baldwin*, 166 U. S. 485).

CONCLUSION

For the reasons hereinbefore stated the petition for certiorari should be denied.

Respectfully submitted,

JOHN M. DOWNES,
Attorney for Louis H. Pink, Superintendent of Insurance of the State of New York as Liquidator of the Domesticated United States Branch of First Russian Insurance Company, Established in 1827, Respondent,

April 21, 1941.

[APPENDICES FOLLOW]

Appendix A

NEW YORK CIVIL PRACTICE ACT

§ 476. JUDGMENT ON PLEADINGS OR ADMISSION OF PART OF CAUSE. Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require. (New. See Code § 511, in part; § 547.)

Appendix B

NEW YORK RULES OF CIVIL PRACTICE

RULE 113—SUMMARY JUDGMENT. When an answer is served in an action.

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or liquidated demand arising on a judgment for a stated sum; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or

7. For specific performance of a contract in writing for the sale of purchase of property, including such alternative and incidental relief as the case may require; or

8. For an accounting arising on a written contract, sealed or not sealed.

The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in subdivisions 3, 4 or 5 hereunder shall fail to show such facts as

may be deemed, by the judge hearing the motion, to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in subdivisions 6, 7 and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions. (As amended March 14, 1932, and May 11, 1933; in effect June 15, 1933.)